In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-1545

THE DAILY REVIEW, INC., a corporation, BAY AREA PUBLISHING CO., a corporation, FLOYD L. SPARKS, an individual, WILLIAM CHILCOTE, an individual, DALLAS CLELAND, an individual, JOHN CLARK, an individual,

Petitioners,

vs.

DOUGLAS K. KNUTSON, ARLEN N. BENHAM, GEOFFREY BEATY, LAURA DUARTE, EVAN FRANCIS WILLIAMS, JOSEPH W. BERTHIAUME, KENNETH W. JACKSON, JEAN E. NYLAND, DANIEL A. DUTRA, WILLARD B. KITTREDGE, ROBERT A. DUTRA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

G. JOSEPH BERTAIN, JR.,
TIMOTHY H. FINE,
W. THOMAS AMEN,
PATRICK J. CARTER,
50 California Street, Suite 955
San Francisco, California 94111
Telephone: (415) 981-4938
Attorneys for Respondents.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO CA 94105

Subject Index

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement of the case	3
Argument	11
A. The petition is premature	11
B. There is no conflict with applicable decisions of this court	12
C. There is no conflict between the circuits	13
D. No disregard of F.R.Civ.P. 52(a)	15
Conclusion	15

Table of Authorities Cited

Cases	Pages
Albrecht v. Herald Co., 390 U.S. 145 (1968), rehearing denied 390 U.S. 1018	8, 9
American Construction Co. v. Jacksonville, T.&K.W.Ry.Co., 148 U.S. 372 (1893)	12
Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946), rehearing denied 327 U.S. 817	12
Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967)	12
Cobbledick v. United States, 309 U.S. 323 (1940)	12
Continental Ore Co. v. Carbide & Carbon Corp., 370 U.S. 690 (1962)	13
Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934 (5th Cir. 1975)	13, 14
Gray v. Shell Oil Co., 469 F.2d 742 (9th Cir. 1972), cert. denied 412 U.S. 943	15
Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 (1916)	12
Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), rehearing denied 393 U.S. 901	13
Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690 (5th Cir. 1975), cert. denied 424 U.S. 943	13
Rea v. Ford Motor Co., 497 F.2d 577 (3d Cir. 1974), cert. denied 419 U.S. 868	14
United States v. Parke, Davis & Co., 362 U.S. 29 (1960)	8
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)	12
Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. 100 (1969)	13

Rules	
Federal Rules of Civil Procedure, Rule 52(a)	15

Statutes	
Clayton Act (38 Stat. 731, 15 U.S.C. §15)	2
Sherman Act (26 Stat. 209, as amended, 15 U.S.C. §1)	2, 9

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1545

THE DAILY REVIEW, INC., a corporation, BAY AREA PUBLISHING CO., a corporation, FLOYD L. SPARKS, an individual, WILLIAM CHILCOTE, an individual, DALLAS CLELAND, an individual, JOHN CLARK, an individual,

Petitioners,

vs.

DOUGLAS K. KNUTSON, ARLEN N. BENHAM, GEOFFREY BEATY, LAURA DUARTE, EVAN FRANCIS WILLIAMS, JOSEPH W. BERTHIAUME, KENNETH W. JACKSON, JEAN E. NYLAND, DANIEL A. DUTRA, WILLARD B. KITTREDGE, ROBERT A. DUTRA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION[1]

OPINIONS BELOW

The opinion of the Court of Appeals (App. A of Petition) is officially reported at 548 F.2d 795. The

[1]On May 7, 1977 respondents filed a petition for a writ of certiorari with this Court, No. 76-1544.

opinion of the District Court (App. B of Petition) is officially reported at 383 F.Supp. 1346.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Was the Court of Appeals in error in reversing the District Court's conclusion of law that distributors whose resale prices were unlawfully fixed by the manufacturer must prove with a reasonable probability that they would have raised their prices during the period of such unlawful price fixing as a prerequisite of recovering damages caused by such illegal price fixing?

2. Was the Court of Appeals in error in holding that, absent evidence to the contrary, distributors whose resale prices were unlawfully fixed by the manufacturer would have raised their prices during the period of such unlawful price fixing if it is established that it would have been profitable to do so?

STATUTES INVOLVED

The pertinent provisions of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. §1) and the Clayton Act (38 Stat. 731, 15 U.S.C. §15) are set forth in the Petition at pp. 3-4.

STATEMENT OF THE CASE

All of the respondents, plaintiffs below, were independent distributors of newspapers published by The Daily Review, Inc. ("DRI"). Petitioners, defendants below, are two corporations and individual officers or employees of those corporations. DRI publishes *The Daily Review,* a daily afternoon newspaper; *The Argus,* a daily morning paper; and *The Daily Review Shopping News,* a "throwaway" weekly advertising circular. Bay Area Publishing Company ("BAPCO") publishes the *Tri-Valley Herald,* a daily morning paper; and the *Tri-Valley News,* a three-day per week, controlled circulation afternoon paper. BAPCO is a wholly-owned subsidiary of DRI. The individual defendants are Floyd L. Sparks, William Chilcote, Dallas Cleland, and John Clark. Floyd L. Sparks is the controlling shareholder of DRI, the president of DRI and BAPCO, and the publisher of both companies' newspapers. William Chilcote is a vice-president and business manager of DRI and a member of the Board of Directors of DRI and BAPCO. Dallas Cleland is the director of circulation and John Clark is the promotion manager of the four newspapers published by BAPCO and DRI. CT 1453-54.

In approximately 1950 Sparks adopted the independent dealer system for distribution of *The Daily Review.* At this time Sparks was operating on a marginal basis and he was interested in keeping his costs down. Thereafter this system was used for distribution of each daily newspaper acquired by Sparks or DRI so that until September 1, 1973 all daily

newspapers published by companies owned or controlled by Sparks were distributed through dealers. CT 1457; RT 546-548.

Under this distribution system each dealer, including respondents, was a party to a Dealers' Agreement with DRI. The dealer purchased his copies of *The Argus* or *The Daily Review* from DRI and resold them for his own account to independent carriers—boys and girls under the age of 18. These carriers, in turn, resold the newspapers to home delivery subscribers. Each dealer was engaged as an independent contractor pursuant to the terms of a written dealership agreement, not as an employee of DRI. Upon purchase of the newspapers each dealer had complete ownership of, possession of, and dominion over the papers. DRI did not reimburse a dealer for unsold copies, and the dealers had to sustain all losses from carrier defalcations. Each dealer owned such equipment as was necessary for the distribution of the newspapers to the carriers. The dealers derived their profit and paid their expenses from the difference between the price at which they sold the newspapers to their carriers and the price at which they purchased the papers from DRI. CT 1457-58.

Prior to December 1, 1969, DRI used a standard form of dealer's agreement which provided that the dealer would sell newspapers to the subscribers within his route or territory at a fixed subscription price and that the subscription price, the price paid to the publisher by the dealer, and the size and boundaries

of the territory were subject to change by the publisher in his sole discretion. CT 1458-59.

A dispute arose sometime prior to December 1, 1969 whether under the terms of this agreement certain *Herald* and *News* dealers were independent contractors or employees of the publisher. As a result of this dispute, DRI, with the assistance of the Western Newspaper Industrial Relations Bureau, adopted a new Dealer's Agreement which went into effect on December 1, 1969, and governed the relations between DRI and BAPCO on the one hand and *Daily Review, Argus, Herald,* and *News* dealers on the other until September 1, 1973. That agreement provided in pertinent part:

> "That the Dealer will sell the Daily Review [Argus, etc.] at the current subscription rate to his individual subscribers and cause same to be delivered to them each date of publication in a manner consistent with the best interests of both parties to this agreement. That the rate at which the Dealer sells to accounts for resale will be set by himself or through negotiations between himself and the account." CT 649-50; RT 410-11.

During the life of this agreement, all of the independent dealers, including respondents, complied with its terms. Prior to September 1, 1973, the *Daily Review* dealers uniformly sold the paper, through their carriers, to subscribers at the publisher's home delivery subscription rate. Sales to subscribers by *Argus* dealers were also at the publisher's home sub-

scription price.[2] Moreover, when the publisher announced an increase in the *Argus* monthly home delivery rate, effective March 1, 1973, from $2.50 to $3.00, all of the *Argus* dealers uniformly commenced to charge the higher rate. CT 1460.

As a result of respondents' counsel writing Floyd L. Sparks a letter bringing to his attention the illegality of the dealer agreement and requesting the opportunity to negotiate a new lawful dealer agreement on behalf of his clients, all *Daily Review, Argus, Herald* and *News* dealers were notified of their termination as dealers effective at the close of business on August 31, 1973. CT 654-55.

On September 1, 1973 sixteen of the twenty-three *Daily Review* districts were converted from an independent dealer/independent carrier operation to an employee/independent carrier operation. Also on September 1, 1973 five of the ten *Argus* districts and all of the *Herald* districts were converted from an independent dealer/independent carrier operation to an employee/independent carrier operation. RT 102-104. Respondents Knutson, Benham, Jackson, and Robert Dutra continued as dealers until November 1, 1974 when their districts were converted to an employee/independent carrier operation. Respondent Duarte continued as a dealer until April 1, 1975 when her district was converted to an employee/independent

[2]There were two instances of carriers in plaintiff Knutson's organization charging more than the "current subscription price" established by DRI for the *Argus*. After being informed of the overcharge by the *Argus* circulation manager, Knutson corrected the error and gave the customers a credit in the amount of the overcharge.

carrier operation. Respondents Beaty, Williams, Berthiaume, Nyland, Daniel Dutra and Kittredge continued as dealers until July 1, 1975 when their districts were converted to an employee/independent carrier operation.

Between September 1, 1973 and November 1, 1973 the seven remaining *Daily Review* dealers increased their prices of *The Daily Review* to their carriers and pursuant to their suggestion their carriers raised the subscription price above that advertised by the publisher. When each such price increase occurred, all professional solicitation for new customers in that district ceased although such solicitation continued in the districts of the employee district managers. CT 1465. This increase yielded a higher profit per subscriber and a decrease in the number of subscribers for each of the seven *Daily Review* dealers. The net result was that each *Daily Review* dealer was earning more profit per month when free of the price fixing than during the period each was subject to the price restraint. Because the trial on damages began on April 16, 1974, the largest new-price period for which data was available was six months (September 1, 1973 to February 28, 1974). Based upon the increased profit per subscriber and loss of circulation during the new-price period for each *Daily Review* dealer the amount of damages suffered during the price-fixing period (up to a maximum of 4 years) was derived (ranging from $1,800 to $36,000) for each of the seven *Daily Review* dealers. This figure was quite conservative because not all of the circulation drop was caused by the price increase and during the

"after" period all professional solicitation for new subscribers ceased. At the upcoming new trial on damages respondents will have data for a much longer "after" period than was the case below. 548 F.2d, at 810.

At the liability trial the petitioners conceded that the contract provision of the dealer's agreement was an agreement to maintain the resale price of the newspaper, but that in the absence of actual coercion of the dealers by the publisher, such agreements to maintain resale prices do not constitute vertical price fixing agreements and therefore should be judged under the rule of reason than by the *per se* standards applied generally in price fixing cases. CT 1466. The District Court disagreed stating:

> "Where, as here, there is an express or implied agreement which places control of the retail price in the hands of the manufacturer or publisher, a search for such combinations by coercive conduct become irrelevant. Where, in the context of such vertical relationships, title, dominion, and risk with respect to the goods in question have passed to the dealer, the price fixing agreement, whether express, tacit, or implied, is itself illegal. *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373, 398-400, 407-408 (1911); *United States v. Parke, Davis & Co., supra* at 45 n.6; *United States v. Bausch & Lomb Co.*, 321 U.S. 707, 721 (1944). '[T]he long-accepted rule in §1 cases [is] that resale price fixing is a *per se* violation of the law whether done by agreement or combination.' *Albrecht v. Herald Co., supra* at 151 (footnote omitted). Here there is such an agreement in the form of a written contract, and it is

a *per se* violation of §1 even though it fixes the maximum rather than the minimum resale price, *ibid.* at 152-153; *Kiefer-Stewart Co. v. Seagram & Sons,* 340 U.S. 211, 213, *rehearing denied,* 340 U.S. 939 (1951) and even though the agreement is between a single supplier and his many dealers. *Albrecht v. Herald Co., supra* at 152 n. 8." CT 1469.

Notwithstanding this obvious violation of Section 1 of the Sherman Act, 15 U.S.C. §1, the District Court stated that this was a mere "technical violation" (CT 1499) of Section 1. The District Court's view of vertical price fixing as a "technical violation" was based solely upon the financial interests of the publishers in total disregard of the rights and financial interests of the distributors. In its opinion the District Court discussed at some length the economic needs of newspapers to control newspaper subscription rates:

> "The profits of independent dealers are derived, on the other hand, solely from circulation. They have no direct financial interest in the advertising revenue received by the publisher and derive no income from such advertising payments. These independent contractors have little, if any, knowledge about or interest in the overall revenue structure of the newspaper or the effects which an increase in the subscription price will have on the other operations of the newspaper, such as advertising space, editorial quality of the paper or quantity of news and features. While they are, no doubt, concerned about the general economic welfare of the newspaper, *the independent dealer's paramount interest is in maximizing his*

> *own profits* which are derived exclusively from circulation. Thus an increase in the subscription price may ultimately reduce the publisher's profits, even though such an increase may increase an individual dealer's revenue and profits. Even if circulation declined, the resulting reduction in a dealer's overhead might enable him to maintain a steady profit with less effort on his own part. Thus the publisher's and the dealer's attitudes toward the subscription price are not parallel and under some circumstances may be directly in conflict." CT 1482. (*Emphasis added*)

Although the District Court opined that "the independent dealer's paramount interest is in maximizing his own profits" (CT 1482), on the question of fact of injury the District Court made a complete about face holding that the respondents did not show a reasonable probability that, absent the price fixing restraints, they would have raised their prices during the "before" period. CT 1517. The Court of Appeals recognized the inherent error of the District Court's reasoning stating:

> "The fundamental difficulty with the district court's reasoning is that it creates a nearly insurmountable barrier to recovery in maximum price-fixing cases. A determination of what a dealer would have done is bound to involve speculation and 'second-guessing.' Even if plaintiffs had supplied the corroborating circumstantial evidence apparently sought by the trial judge, assertions of their past intentions would still entail 'conjectural hindsight.'
>
> "Rather than imposing the nearly impossible burden of proving what each dealer would have

done if he had been free to make his own pricing decision, we assume that, absent evidence to the contrary, a dealer would have raised his prices had it been profitable to do so; that is, dealers are profit maximizers. This assumption merely amounts to a recognition that a 'restraint' in fact restrains. The defendants can attempt to show plaintiffs would have kept their prices beneath a maximizing point despite their violative behavior. Contrary evidence might include dealer testimony that he would not have raised his price, or a showing by the defendants that the dealers had reasons other than the restraint for selling below a profit-maximizing price." 548 F.2d, at 812.

ARGUMENT

A. THE PETITION IS PREMATURE

In respect to the loss of profits damages suffered by *The Daily Review* (non-*Argus*) plaintiffs the Court of Appeals reversed the judgment of the District Court and ordered a new damage trial stating:

> "On remand of the amount of damages issue as to the non-*Argus* plaintiffs, the district court is not asked to accept unreliable evidence. Rather, the district court is to make factual findings as to the amount of damages as to which each non-*Argus* plaintiff has offered reliable evidence, having in mind that certitude is not required and that lack of certainty justifies scaling down the award but not total rejection. Defendants, of course, can offer proof that market conditions, intra- and inter-brand forces of competition, or other factors would also have scaled down the plaintiff's claimed loss of profits." 548 F.2d, at 813.

Since the case must go back to the trial court for further proceedings "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K.Ry. Co.*, 148 U.S. 372, 384. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584-85; *Cobbledick v. United States*, 309 U.S. 323, 324-25; *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (lack of finality "of itself alone furnished sufficient ground for the denial"); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court").

B. THERE IS NO CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

The Court of Appeals held that, absent evidence to the contrary, distributors whose resale prices were unlawfully fixed by the manufacturer would have raised their prices during the period of such unlawful price fixing *if it is* established that it would have been profitable to do so. 548 F.2d, at 812. *Daily Review* respondents established that it would have been profitable to raise prices using the before and after test. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251. There this Court held at 266:

> "The comparison of petitioners' receipts before and after respondents' unlawful action impinged

> on petitioners' business afforded a sufficient basis for the jury's computation of the damage, where the respondents' wrongful action had prevented petitioners from making any more precise proof of the amount of the damage."

The Court of Appeals held that the fact that *The Daily Review* respondents established that they made more net profit once the restraint was lifted over that earned during the price fixing restraint was sufficient to demonstrate "fact of injury." To require more would create an impossible burden. This holding is consistent with the applicable decisions of this Court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114; *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699-700; *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 487, fn. 5.

C. THERE IS NO CONFLICT BETWEEN THE CIRCUITS

Petitioners rely upon *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir.), *cert. denied*, 424 U.S. 943 (1976) as being in conflict with the decision of the Court of Appeals below. This is not the case. In *Kestenbaum* the Court of Appeals rejected the distributor's proof of injury claim because it was based upon the wholesale price increases which the Court of Appeals held did not violate the antitrust laws and which were proper. 514 F.2d, at 694.

More in point and consistent with the decision of the Court of Appeals below is *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir.). There,

a liquor store claimed that its loss of the Coors brand as a "loss leader" resulted in damages because of the loss of profits from the sales of other products in the store attributable to the presence of Coors. The Court of Appeals held that in order for the business to have suffered damage from the termination "the profits from the sales of other products in the store attributable to the presence of Coors as a 'loss leader' not only must have been sufficient to make up the loss incurred in selling Coors but also have exceeded the profits on such products earned after the termination." *Ibid.*, at 954. To measure this the Court of Appeals recommended an "examination of the store's profitability *after* the resumption of Coors service" as "relevant to the problems of proof on the issues of injury and damages." *Ibid.*, at 954.

The decision in *Rea v. Ford Motor Co.*, 497 F.2d 577 (3d Cir.), *cert. denied,* 419 U.S. 868 is likewise consistent with the Court of Appeals' decision below. There, the Third Circuit held in a retail price fixing situation that since "the market in new Ford cars was not competitive, both because of the price-fixing agreement with Ford and the buying power of Hertz and Avis, it would be inappropriate to require 22 Ford to show that it could have sold cars to Hertz and Avis at a higher price than the formula [fixed] price." 497 F.2d, at 592, fn. 30.

And as pointed out by the Court of Appeals below the corollary of the assumption of profit-maximizing behavior is that if dealer price hikes result in a decrease in profits in the period of no price restraint,

the fact of damage is not proven, as occurred in the case of *Gray v. Shell Oil Co.*, 469 F.2d 742 (9th Cir.), *cert. denied*, 412 U.S. 943.

D. NO DISREGARD OF F.R.CIV.P. 52(a)

The petitioners are in error in characterizing the impossible requirement of the District Court for proof of injury as a finding of fact. Rather, the issue here is the legal standard to be applied to proof of antitrust injury and damages. The Court of Appeals merely enunciated a well established standard which the District Court had disregarded.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

G. JOSEPH BERTAIN, JR.,
TIMOTHY H. FINE,
W. THOMAS AMEN,
PATRICK J. CARTER,
Attorneys for Respondents.

June 7, 1977.